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In the Supreme Court of the United States

OCTOBER TERM, 1996

DAVID S. HESS, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the common-law doctrine enunciated in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and its progeny was supplanted by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, with respect to claims based on transactions that occurred before FIRREA was enacted.

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1a-55a) is reported at 83 F.3d 1317. The panel opinion of the court of appeals (Pet. App. 56a-73a) is reported at 39 F.3d 292. The orders of the district court dismissing petitioners' complaint (Pet. App. 76a-83a) and denying petitioners' motions for rehearing and for leave to amend their complaint (Pet. App. 74a-75a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1996. The petition for a writ of certiorari was filed on July 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. This case concerns the continued viability of a common-law doctrine first articulated by this Court more than 50 years ago in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942). *D'Oench* involved a suit by the Federal Deposit Insurance Corporation (FDIC), in its corporate capacity, to collect a note held by a failed bank. The Court held that federal policy, expressed in the Federal Reserve Act, precluded the assertion by the maker of the note of a defense based on an alleged oral agreement with the bank that the note would never be called for payment. That holding was consistent with the Court's understanding of generally applicable state-law principles, under which "an accommodation maker [wa]s not allowed that defense as against the receiver of the bank and its creditors, or at times even as against the bank itself, where his act contravene[d] a general policy to protect the institution of banking from such secret agreements." *Id.* at 458. The Court clarified that "[t]he test is whether the note was designed to deceive the creditors or the [government banking] authority, or would tend to have that effect." *Id.* at 460. If a secret agreement were allowed as a defense, the Court explained, "the maker of the note would be enabled to defeat the purpose of the [Federal Reserve Act] by taking advantage of an undisclosed and fraudulent arrangement which the statute condemns and

which the maker of the note made possible." *Id.* at 461.

b. In the Federal Deposit Insurance Act of 1950, ch. 967, § 2, 64 Stat. 889 (codified at 12 U.S.C. 1823(e) (1988)), Congress expressly barred the assertion against the FDIC (in its corporate capacity) of any "agreement which tend[ed] to diminish or defeat the right, title or interest of the [FDIC] in any asset acquired by it" from a failed depository institution, unless the agreement (i) was in writing, (ii) had been executed by the depository institution and the adverse party contemporaneously with the acquisition of the asset by the depository institution, (iii) had been approved by the board of directors or loan committee of the depository institution (and was reflected in appropriate minutes), and (iv) had, since its execution, been maintained as an official record of the depository institution. Section 1823(e) codified the specific result reached by the Court on the facts presented in *D'Oench*, and in its strict approval and recording requirements supplemented the protection afforded the FDIC by the common-law doctrine.

Following enactment of Section 1823(e), courts considered the common-law doctrine and its statutory counterpart in tandem. See, *e.g.*, *FDIC* v. *de Jesus Velez*, 678 F.2d 371, 375 (1st Cir. 1982) ("Even if § 1823(e) has been followed, the agreements would be void as a matter of public policy. The agreements were intended to circumvent requirements which protect the FDIC and the interests of depositors in a closed bank."); *Gunter* v. *Hutcheson*, 674 F.2d 862, 868 (11th Cir.) ("Although we conclude that the specific language of § 1823(e) does not protect the FDIC from the Gunters' allegations, we agree with the trial court that principles of federal common law protect

the FDIC from ordinary fraud claims of which it lacks knowledge."), cert. denied, 459 U.S. 826 (1982); *FDIC* v. *Hoover-Morris Enterprises*, 642 F.2d 785, 787 (5th Cir. 1981) ("Apart from the protection against side agreements provided by § 1823(e), FDIC is protected under federal common law as announced in *D'Oench*."); *FDIC* v. *First Nat'l Fin. Co.*, 587 F.2d 1009, 1011-1012 (9th Cir. 1978) (applying *D'Oench* to bar claims against FDIC as receiver); *FDIC* v. *General Investments, Inc.*, 522 F. Supp. 1061, 1070 (E.D. Wis. 1981) (applying *D'Oench* to bar assertion of unwritten agreement against FDIC as receiver); *Dominguez* v. *FDIC*, 90 F.R.D. 595, 598 (D.P.R. 1981) (applying *D'Oench* to bar claim against FDIC as receiver); *FDIC* v. *Vineyard*, 346 F. Supp. 489, 493 (N.D. Tex. 1972) (applying *D'Oench* to bar counterclaim against FDIC as receiver).

After Congress reenacted Section 1823(e) in the Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 113(m), 96 Stat. 1474, the courts continued to apply the statutory bar and common-law doctrine in tandem. While the statute imposed more stringent requirements, it was narrower in scope, and cases that did not fit within its confines continued to be governed by the common law. See, *e.g.*, *FDIC* v. *McClanahan*, 795 F.2d 512, 514 n.1 (5th Cir. 1986) (applying *D'Oench* to bar affirmative defense raised against FDIC as receiver; rejecting argument that enactment of Section 1823(e) supplanted *D'Oench*); *FDIC* v. *Van Laanen*, 769 F.2d 666, 667 (10th Cir. 1985) (applying *D'Oench* to bar defenses raised against FDIC as receiver); *Beighley* v. *FDIC*, 868 F.2d 776, 784 (5th Cir. 1989) (applying *D'Oench* to bar claims against FDIC as receiver); *FSLIC* v. *Two Rivers Assoc., Inc.*, 880 F.2d 1267, 1276-1277 (11th Cir.

1989) (applying *D'Oench* to bar defense raised and counterclaims asserted against Federal Savings and Loan Insurance Corporation (FSLIC)); *Mainland Sav. Ass'n* v. *Riverfront Assocs., Ltd.*, 872 F.2d 955, 956 (10th Cir.) (applying *D'Oench* to bar set-off claim asserted against FSLIC), cert. denied, 493 U.S. 890 (1989); *Firstsouth, F.A.* v. *Aqua Constr., Inc.*, 858 F.2d 441, 442-443 (8th Cir. 1988) (applying *D'Oench* to bar defense raised against FSLIC); *FSLIC* v. *Lafayette Investment Properties, Inc.*, 855 F.2d 196, 198 (5th Cir. 1988) (same); *Andrew D. Taylor Trust* v. *Security Trust Fed. Sav. & Loan Ass'n*, 844 F.2d 337, 342 (6th Cir. 1988) (same); *FSLIC* v. *Maio*, 736 F. Supp. 1039, 1040 (N.D. Cal. 1989) (applying *D'Oench* to bar counterclaim against FSLIC); *National Credit Union Admin. Bd.* v. *First Nat'l Bank of Chicago*, 690 F. Supp. 1580, 1582-1583 (N.D. Ill. 1988) (applying *D'Oench* to bar defenses raised and counterclaims asserted by defendant in suit brought by National Credit Union Administration Board); *FSLIC* v. *Sandor*, 684 F. Supp. 403, 406 n.8 (D.V.I. 1988) ("*D'Oench* still stands as a principle of federal common law.").

c. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, expanded Section 1823(e) to cover defenses raised against (1) the FDIC in its receivership capacity, (2) the newly created Resolution Trust Corporation (in its corporate and receivership capacities), and (3) bridge banks. In relevant part, Section 1823(e)(1) now provides:

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase

> or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement—
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (D) has been, continuously, from the time of its execution, an official record of the depository institution.

FIRREA also added a new provision, 12 U.S.C. 1821(d)(9)(A), which states, in relevant part, that "any agreement which does not meet the requirements set forth in section 1823(e) * * * shall not form the basis of, or substantially comprise, a claim against the receiver or the [FDIC in its corporate capacity]."

d. In *O'Melveny & Myers* v. *FDIC*, 114 S. Ct. 2048 (1994), this Court rejected the FDIC's argument that its interest as insurer of deposits justified the creation of a new federal common-law rule with respect to a state-law action brought by the FDIC as receiver of a state-chartered thrift against the thrift's former outside counsel. The rule would have precluded the imputation to the FDIC of the thrift's officers' knowledge of the defendants' alleged misconduct.

Looking to 12 U.S.C. 1821(d)(2)(A)(i), which provides that "[t]he [FDIC] shall, * * * by operation of law, succeed to * * * all rights, titles, powers, and privileges of the insured depository institution," the Court concluded that "the FDIC as receiver 'steps into the shoes' of the failed S & L, obtaining the rights *'of* the insured depository institution' that existed prior to receivership." *O'Melveny*, 114 S. Ct. at 2054. Accordingly, it held that "in litigation by the FDIC asserting the claims *of* the S & L," absent any provision to the contrary in FIRREA or applicable state law, "any defense good against the original party is good against the receiver." *Ibid.*

The Court was not persuaded by the FDIC's argument that Section 1821(d)(2)(A)(i) constitutes a nonexclusive grant of rights to the FDIC, and that FIRREA's evident purpose to strengthen the hand of the FDIC confirmed the courts' authority to promulgate complementary federal common law. In the Court's view, that argument could not be reconciled with "those provisions of FIRREA which specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver." *O'Melveny*, 114 S. Ct. at 2054 (citing, *inter alia*, 12 U.S.C. 1821(d)(9)). Applying the principle *inclusio unius, exclusio alterius*, the Court found it "hard to avoid the conclusion that § 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S & L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise." *Ibid.*

2. Petitioner David S. Hess was a principal owner of a used car dealership, operated through petitioners Motorcity of Jacksonville, Ltd., and Motorcity of Jacksonville, Inc. (collectively, Motorcity). In 1986,

petitioners and Southeast Bank, N.A. (the Bank) negotiated a floor plan financing agreement under which the Bank would lend Motorcity the funds to purchase its inventory. Petitioners informed the Bank that Hess and other Motorcity investors lacked experience in the used car business and that they intended to be absentee owners. In the course of negotiations, the Bank and petitioners discussed the potential threat to Motorcity from "out-of-trust" sales, which occur when a dealership fails to use the proceeds from the sale of a car to repay the portion of the floor plan loan designated for that car. Pet. App. 2a. The Bank represented that its personnel were experienced with floor plan financing, *ibid.*, and it allegedly assured petitioners that it would notify them if it learned that any cars were being sold out of trust.

In June 1987, the Bank and Motorcity executed the written floor plan financing agreement. The agreement documented the Bank's right to conduct audits of Motorcity's records, providing in relevant part that Motorcity "will permit [the Bank] * * * to make audits, and to inspect and otherwise check its properties." Pet. App. 3a. n.2. It imposed no duty on the Bank to conduct audits of Motorcity, however, nor any requirement that the Bank notify petitioners of out-of-trust sales.

The Bank hired an independent auditor to audit Motorcity on a monthly basis. Through those audits, the Bank allegedly discovered that Motorcity's managers were making numerous out-of-trust sales—paying themselves unearned bonuses rather than repaying amounts owed the Bank under the floor plan financing agreement. The Bank provided Motorcity with monthly operating statements, but it did not

notify Motorcity or its investors of the out-of-trust sales. In February 1989, a newly hired general manager at Motorcity informed Hess and other Motorcity investors that the dealership was "out-of-trust" more than $400,000. Motorcity then notified the Bank, which demanded immediate repayment of the entire out-of-trust amount. When Motorcity failed to meet that demand, the Bank took possession of its collateral, including the dealership and $375,000 in certificates of deposit. Motorcity repaid the balances outstanding on the loans by April 1990. Pet. App. 3a.

3. In October 1990, petitioners filed suit against the Bank in Florida state court, asserting claims of breach of oral agreement, breach of fiduciary duty, and negligence, all based on the Bank's failure to comply with its alleged duty to inform petitioners of Motorcity's out-of-trust sales. In September 1991, the Comptroller of the Currency declared the Bank insolvent and appointed the FDIC as receiver. The FDIC substituted itself as defendant and removed the case to the United States District Court for the Southern District of Florida. After the case was removed, petitioners filed an amended complaint, alleging solely a claim for breach of written contract. Pet. App. 3a-4a.

The district court granted the FDIC's motion to dismiss for failure to state a claim, concluding that the written financing agreement imposed no duty on the Bank to conduct audits or to provide any audit information to Motorcity. Pet. App. 80a. The court held further that both the common-law doctrine established by this Court in *D'Oench* and its statutory counterpart, 12 U.S.C. 1823(e), bar petitioners from relying on any unwritten understanding to support their contract claim. Pet. App. 80a-81a. Finally,

the court rejected petitioners' request for leave to assert a negligence claim, noting that "[t]he genesis of this action is the * * * floor plan financing agreement, whose written provisions do not support a breach of contract claim against the FDIC[,] [and] [n]o amount of artful pleading * * * can alter this result." *Id.* at 82a. Consistent with that determination, the court denied petitioners' later motion for reconsideration and request to amend the complaint to include claims sounding in negligence and breach of fiduciary duty. *Id.* at 74a-75a.

4. A panel of the court of appeals reversed. Pet. App. 56a-73a. The panel concluded that Motorcity's putative claims for negligence and breach of fiduciary duty are "free standing" tort claims that do not depend upon any written or oral contract between petitioners and the Bank, and that those claims are therefore not barred by the *D'Oench* doctrine or Section 1823(e). Pet. App. 68a-70a. On June 29, 1995, the full court granted the FDIC's petition for rehearing with suggestion of rehearing en banc, vacating the panel opinion. *Id.* at 4a-5a; 58 F.3d 589.

On August 1, 1995, the District of Columbia Circuit held that this Court's decision in *O'Melveny* compels a finding that the enactment of FIRREA displaced the common-law *D'Oench* doctrine. *Murphy* v. *FDIC*, 61 F.3d 34 (1995).[1] In response to *Murphy*, on Septem-

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[1] The court of appeals in *Murphy* was persuaded that this Court's inclusion of Section 1821(d)(9) within its recitation of various special rights accorded the FDIC by FIRREA (which, by implication, excluded the creation of supplemental common-law rights) "necessarily decided the *D'Oench* question." 61 F.3d at 39 (citing *O'Melveny*, 114 S. Ct. at 2054). The court acknowledged, however, that "the continuing vitality of *D'Oench* was not directly before [this Court in *O'Melveny*]." *Ibid.*

ber 12, 1995, the Eleventh Circuit requested the parties in this case to file supplemental briefs addressing the continued viability of *D'Oench*. Upon full briefing of that issue, the en banc court unanimously affirmed the judgment of the district court. Pet. App. 1a-55a.

a. As an initial matter, the court disagreed with *Murphy*'s conclusion that this Court's rationale in *O'Melveny* compels a finding that the common-law *D'Oench* doctrine was supplanted by FIRREA. Pet. App. 14a. The court observed that *O'Melveny* addressed whether the federal courts should create a new federal common-law doctrine. *Id.* at 20a. Here, the court explained, the question "is not whether a *new* rule should be invented, but whether Congress intended to abrogate the previously established federal common-law *D'Oench* doctrine." *Id.* at 20a-21a. The court found that *United States* v. *Texas*, 507 U.S. 529 (1993)—which reaffirmed that a previously-established federal common-law doctrine is presumed to survive unless a congressional intent to supplant the doctrine is evident (*id.* at 534)—provides the appropriate analytical framework. Pet. App. 21a. Noting that "neither FIRREA in general, nor §§ 1821(d)(9)(A) and 1823(e)(1) in particular, comprehensively address the *substance* of the federal common law *D'Oench* doctrine," the court saw no indication "that Congress undertook a comprehensive examination of the federal common law *D'Oench* doctrine, or made any attempt to address comprehensively that vast doctrine." *Id.* at 25a. To the contrary, the court found continuation of the *D'Oench* doctrine consistent with Congress's intent through FIRREA to broaden the powers of the FDIC and thereby enhance the FDIC's ability to operate

effectively in the face of the savings and loan crisis. *Id.* at 26a-27a.

The court of appeals concluded, moreover, that "the history of the interaction between *D'Oench* common law and the statute strongly indicates that Congress did not intend preemption." Pet. App. 26a. It explained (*id.* at 26a-27a):

> The statute at issue began in 1950 as a partial codification of the *D'Oench* case. Subsequently, just as the *D'Oench* decision itself was a common law rule fashioned to fill the interstices of federal statutes, courts continued to apply the common law *D'Oench* doctrine beyond the confines of the statutory language in order to fulfill Congress' purposes in enacting § 1823(e)(1). Thereafter, in the intervening forty years, the common law *D'Oench* doctrine and the cases under the statute evolved together, each drawing upon the other. * * * Since the creation of § 1823(e)(1) in 1950, innumerable cases in every circuit court of appeals have held that the common law *D'Oench* doctrine and the statute continued to apply and complement each other. Thus, in 1989, when Congress addressed this special area of federal concern as a small part of the overall crisis in the banking industry, Congress was looking at forty years of harmonious coexistence of the common law doctrine and the statute. When Congress merely carried over the substance of the § 1823(e)(1) language, we believe that the most reasonable reading of the congressional intent is that Congress codified parts of the evolving *D'Oench* common law, left the state of the law unchanged, and left in place both the statute and

the federal common law *D'Oench* doctrine to fill in the inevitable gaps left by the statutory language.

b. The court rejected petitioners' argument that *D'Oench* does not bar their oral contract claim in this case because Motorcity paid off its indebtedness before filing its claims against the Bank. Pet. App. 28a-33a. The court explained that acceptance of that claim

> would result in absurdity. For example, suppose that a plaintiff wished to bring tort claims against the FDIC on the basis of alleged oral representations made by the failed bank in connection with the negotiation of the plaintiff's loan, and suppose that the alleged oral representations contradict the written loan terms. This hypothetical plaintiff's claims would fall within the core of the *D'Oench* doctrine and would be barred. Under [petitioners'] argument, however, the plaintiff could circumvent the *D'Oench* bar simply by paying off the balance of his or her loan before filing suit, leaving the FDIC without an interest in a specific asset. Such a result would seriously undermine the policies of the *D'Oench* doctrine: to protect the bank examiners who rely on the bank's records in assessing the bank's condition, to protect the FDIC's ability to insure deposits, and to place the burden on borrowers to make sure that all of the terms of their loan agreements are in writing.

Id. at 31a (citation omitted).

c. The court held that petitioners' putative negligence and breach of fiduciary duty claims are also barred by *D'Oench*, because the existence of the Bank's purported duty depends, as a matter of state

law, on the unrecorded oral representations allegedly made by the Bank in the negotiations that culminated in the floor plan financing agreement. Pet. App. 33a-48a. Moreover, the court concluded, under Florida's "economic loss" rule, petitioners are precluded from recovering in tort purely economic losses caused by the Bank's alleged breach of oral contract. *Id.* at 48a-51a. See also *id.* at 49a ("The rationale underlying the economic loss rule is that parties who have allocated risks among themselves by contract should not be permitted to ignore their bargain after incurring a loss involving the subject matter of the contract.").

d. In light of the court's conclusion that the federal common-law *D'Oench* doctrine bars petitioners' claims, it expressly declined to decide whether petitioners' claims would also be precluded by Section 1821(d)(9). Pet. App. 29a-30a.

ARGUMENT

1. Petitioners argue that this Court should grant certiorari in this case to resolve the conflict between the Eleventh Circuit, on the one hand, and the District of Columbia Circuit (*Murphy* v. *FDIC*, *supra*) and Eighth Circuit (*DiVall Insured Income Fund Ltd. Partnership* v. *Boatmen's First Nat'l Bank*, 69 F.3d 1398, 1402 (1995)), on the other hand, over whether the enactment of FIRREA supplanted the common-law *D'Oench* doctrine. This case does not present that issue. Irrespective of whether FIRREA supplanted *D'Oench* with respect to defenses or claims based on unwritten agreements made at or after the time of FIRREA's enactment, FIRREA cannot be said to have supplanted the application of *D'Oench* with respect to defenses or

claims (like petitioners') based on unwritten agreements that predate FIRREA.

In this case, petitioners' claims are based on oral representations allegedly made by the Bank in 1986 (in connection with a financing agreement that was executed in 1987)—years before the enactment of FIRREA. As we explain below, the operative provisions of FIRREA, 12 U.S.C. 1821(d)(9) and 1823(e) (as amended by FIRREA), do not govern transactions that occurred before the statute was enacted, and there can be no contention that FIRREA displaced the common law with respect to transactions that predate its effectiveness.

a. Upon FIRREA's enactment, the FDIC argued, based on this Court's analysis in *Bradley* v. *School Board of Richmond*, 416 U.S. 696 (1974), that Sections 1821(d)(9) and 1823(e) (as amended by FIRREA) apply retroactively to govern the validity of claims and defenses that are based on agreements made prior to the enactment of the statute. See, *e.g.*, *FDIC* v. *Wright*, 942 F.2d 1089 (7th Cir. 1991), cert. denied, 504 U.S. 909 (1992). This Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), however, clarified the analysis applicable to questions of statutory retroactivity.

In most cases litigated since *Landgraf* (including this case, *Murphy* and *Boatmen's*) neither the parties nor the courts have focussed on retroactivity concerns. The courts of appeals that have addressed the issue, however, have concluded that Sections 1821(d)(9) and 1823(e) (as amended by FIRREA) do not apply in cases where the transactions at issue occurred before the enactment of the statute. See *Oklahoma Radio Assocs.* v. *FDIC*, 987 F.2d 685, 695-696, motion to vacate denied, 3 F.3d 1436 (10th Cir.

1993); *Murphy* v. *FDIC*, 38 F.3d 1490, 1501 (9th Cir. 1994) (*en banc*) (noting the FDIC's concession in that regard). Having had the opportunity comprehensively to review the matter in light of *Landgraf* and its progeny, we agree that those provisions of FIRREA cannot lawfully be applied to bar claims or defenses that are based on agreements entered into before the statute was enacted.

b. This Court explained in *Landgraf* that, absent an express provision otherwise, a case will not be governed by "a federal statute enacted after the events in suit" if such application "would have retroactive effect." 511 U.S. at 280. A statute has retroactive effect if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Ibid.*

The application of those principles here is straightforward. No provision within FIRREA addresses the temporal reach of Section 1821(d)(9) or Section 1823(e) (as amended by FIRREA). If the courts were to apply those provisions to agreements made before the statute was enacted, that would unquestionably alter the rights possessed by the parties to such agreements. Before FIRREA, a borrower could assert an affirmative claim against the FDIC or the FSLIC, or a defense against the FDIC (as receiver) or the FSLIC, based on a written agreement that failed to meet the contemporaneous-execution, approval, and recording requirements of Section 1823(e), so long as the borrower had not lent himself to an arrangement or scheme likely to mislead bank examiners. *D'Oench*, 315 U.S. at 460. For example, a borrower could so rely on a written agreement executed by the bank's president but not approved by its board of directors or

loan committee. Application of Section 1821(d)(9) and the expanded version of Section 1823(e) would retroactively eliminate that right. Under the principles articulated by this Court in *Landgraf*, Congress must therefore be presumed to have intended for those provisions to apply only with respect to agreements made after the enactment of FIRREA.[2]

c. Because the operative provisions of FIRREA do not apply to agreements made before the statute was enacted, such agreements are governed by pre-FIRREA law, including then-established federal common law. Petitioners' claims in this case are based on an oral agreement allegedly made in 1986, pertaining to a written financing agreement executed in 1987. The subsequent enactment of FIRREA

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[2] Petitioners, who neglected to document in any form whatever the Bank's alleged duties to conduct audits for their benefit and inform them of out-of-trust sales, cannot be said to have relied on the fact that, at the time, a failure to meet Section 1823(e)'s heightened requirements did not bar the assertion of a nonconforming agreement as the basis of an affirmative claim against the FDIC. Irrespective of whether petitioners actually acted in reliance on the state of prior law, however, the changes effected by FIRREA do not govern the legal significance of an agreement petitioners allegedly entered into before FIRREA was enacted. A statute operates retroactively if it "would impair rights a party *possessed* when he acted," *Landgraf*, 511 U.S. at 280 (emphasis added), and, absent an express congressional statement to the contrary, a statute will not be applied retroactively to alter those rights, irrespective of whether the party was aware of its rights when it acted, or whether the party would in fact have acted any differently had its rights been as set forth in the new statute. Cf. *Rivers* v. *Roadway Express, Inc.*, 114 S. Ct. 1510, 1517-1520 (1994) (rejecting the argument that a restorative statute should be applied retroactively because it "simply enacts a rule that the parties believed to be the law when they acted").

should not affect the applicability of the *D'Oench* doctrine to those claims.

2. The petition focusses almost entirely on petitioners' contention that, under *O'Melveny*, the enactment of FIRREA must be understood to have displaced preexisting federal common law. Their statutory argument relies generally on the comprehensive nature of FIRREA and with specificity on the text of 12 U.S.C. 1821(d)(2)(H), which was enacted as part of FIRREA. See Pet. 11, 22-25. As we have explained, however, it is irrelevant in this case whether or not FIRREA displaced the common-law *D'Oench* doctrine. To the extent that petitioners also suggest (Pet. 20, 22) that *D'Oench* might have been supplanted 46 years ago when Section 1823(e) was first enacted, that proposition was correctly rejected by the Eleventh Circuit (Pet. App. 28a) and it does not warrant further review.

Unlike FIRREA, the Federal Deposit Insurance Act of 1950 could not be described as comprehensive legislation. Although Section 1823(e) codified the result reached by this Court on the particular facts presented in *D'Oench*, nothing in the text of the 1950 Act or its legislative history suggests any intention on the part of Congress wholly to supplant the common-law doctrine. *McClanahan*, 795 F.2d at 514 n.1. In the years following the enactment of Section 1823(e), "innumerable cases in every circuit court of appeals * * * held that the common law *D'Oench* doctrine and the statute continued to apply and complement each other." Pet. App. 26a-27a; see also pages 3-5, *supra*. Although the court of appeals in *Murphy* suggested that *D'Oench might* have been supplanted by the enactment of Section 1823(e) (61 F.3d at 39), no court has so held, and the over-

whelming weight of judicial authority argues otherwise.

In any event, even if the viability of *D'Oench* with respect to transactions predating FIRREA were debatable, that issue would not warrant this Court's consideration. The cases that involve oral agreements allegedly made before the enactment of FIRREA comprise a finite set that is rapidly diminishing over time.

3. Even if the relevant provisions of FIRREA were to apply to transactions that predate the statute, certiorari would not be warranted in this case. Whether *D'Oench* continues to function as a safety net, filling unintended gaps in the statute, is relevant only in cases in which the statute does not itself address the transactions at issue. Here, if Section 1821(d)(9) were applicable, it would by its plain terms bar petitioners' reliance on any unwritten side-agreement.

a. Section 1821(d)(9) provides that "any agreement which does not meet the requirements set forth in section 1823(e) * * * shall not form the basis of, or substantially comprise, a claim against the receiver." 12 U.S.C. 1821(d)(9)(A). Section 1823(e) in turn imposes four enumerated "requirements": An agreement may not be asserted as a defense to claims by the FDIC unless it:

> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (D) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. 1823(e)(1). Petitioners' purported side-agreement fails all four requirements.

b. Contrary to petitioners' suggestion (Pet. 13 & n.5) and the court of appeals' similar conclusion in *Murphy* (61 F.3d at 37-38), the statutory definition of the scope of agreements to which Section 1823(e) applies—*i.e.*, those agreements "which tend[] to diminish or defeat the interest of the [FDIC] in any asset acquired by it" (12 U.S.C. 1823(e)(1))—is not a "requirement" that Section 1823(e) imposes on those agreements, which if not "met" renders Section 1821(d)(9) inapplicable.[3] Petitioners' argument that Section 1823(e) imposes an "asset" requirement ignores the obvious structure of Section 1823(e),

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[3] None of the other cases that petitioners cite addresses whether a borrower can avoid the bar of Section 1821(d)(9) by paying off his loan before asserting against the FDIC a claim based on an unwritten or otherwise nonconforming loan agreement. Indeed, of the cases cited by petitioners, only *John* v. *RTC*, 39 F.3d 773 (7th Cir. 1994), and *Thigpen* v. *Sparks*, 983 F.2d 644 (5th Cir. 1993), even involved an application of Section 1821(d)(9), and the holdings of those cases turned on the fact that the agreements there at issue related to the sale of an asset, rather than the acquisition of an asset, by the failed bank. See *John*, 39 F.3d at 776; *Thigpen*, 983 F.2d at 646-647.

which quite clearly enumerates in subparts (A) to (D) the requirements that it imposes.

The implication of petitioners' textual interpretation, moreover, is plainly untenable. Since Section 1821(d)(9) provides that an agreement that fails to meet the requirements of Section 1823(e) cannot form the basis of a claim against the FDIC, if petitioners were correct—*i.e.*, if Section 1823(e) did impose an "asset" requirement—then no agreement that does not relate to a specific asset presently held by the FDIC could form the basis of a claim against the FDIC. That would, of course, impose an additional bar to petitioners' own claims. More critically, it would preclude the enforcement against a federal receiver of a failed bank's run-of-the-mill trade and service agreements, which cannot have been Congress's intent.

More generally, there is no reason to suppose that Congress intended the scope of Section 1821(d)(9) to be coextensive with that of Section 1823(e). Section 1823(e) applies only with respect to agreements that pertain to assets held by the FDIC *because* the function of that Section is to bar certain defenses to the FDIC's collection on such assets. Section 1821(d)(9)'s function, in contrast, is to bar certain affirmative claims against the FDIC. It does so in order to affect primary conduct; *i.e.*, to provide an incentive for parties contracting with banks thoroughly to document their transactions. That in turn: (1) allows federal and state bank examiners to rely on a bank's records in evaluating its worth; and (2) ensures mature consideration of unusual banking transactions by senior bank officials and prevents the fraudulent insertion of new terms when a bank appears headed for failure. Cf. *Langley* v. *FDIC*, 484

U.S. 86, 91-92 (1987). It would disserve those purposes to permit a borrower to evade Section 1821(d)(9) and assert affirmative claims against the FDIC based on a nonconforming agreement simply by paying off its loan before filing suit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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